G.T. RAJAN

v.

LEE YOKE LAY @ LEE KIM AUN & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' HAJI WAN MOHAMED BIN WAN MUSTAPHA J.,
DATO' ABDUL MALEK BIN HAJI AHMAD J.
DATO' JAMES FOONG J.
[ORIGINATING MOTION NO. R1-25-2-1992]
19 APRIL 1994

LEGAL PROFESSION: Sale and purchase of land - Terms contained in agreement - Appellant solicitor for vendors (respondents) - Balance of purchase price - Vendors requesting to place balance of purchase price in fixed deposit - Appellant releasing balance of purchase price without any interest - Whether appellant was an agent or stakeholder throughout the transaction - The word "stakeholder" not expressly stated in agreement - Delay in forwarding memorandum of transfer for adjudication and stamping - Whether appellant to be blamed.

LEGAL PROFESSION: Disciplinary proceedings - Whether appellant solicitor was guilty of conduct otherwise unbefitting an Advocate and Solicitor - Section 93(2)(b) of Legal Profession Act 1976 - Whether disciplinary committee erred in fact and in law.

A sale and purchase agreement was executed on 28 July 1989 by the respondents as registered owners of a piece of land. The appellant was the solicitor handling the transaction for the respondents.

There were certain terms spelled out in the sale and purchase agreement relating to:

(a) receipt and release of the balance of purchase price; and
(b) protection of both parties concerned i.e. vendor and purchaser.

The balance of the purchase price was paid to the appellant and the respondents requested that this amount be deposited into a fixed deposit account.

The balance was only released to the respondents, without any interest some 4 months after receipt of the same by the appellant.

A complaint was lodged by the respondents to the State Bar Committee which culminated in an enquiry by the disciplinary committee appointed by the Chief Justice persuant to s. 99 of the Legal Profession Act 1976 (before its amendment in 1992).

The appellant now appeals against the decision of the disciplinary committee.

Issues:

(1) During the whole transaction, was the appellant a solicitor for the respondents or a stakeholder.

(2) Was the appellant late in sending the memorandum of transfer for adjudication and stamping.

Held:

[1] In order to decide whether a person is an agent or a stakeholder, "the circumstances of the transaction as a whole" must be examined. The terms in clause 2 are clear and they were inserted to protect the interests of both the parties to the agreement. In order to do so the appellant has to play the role of a stakeholder though the word "stakeholder" was not expressly stated in the agreement.

[2] It is trite law that if a person is a stakeholder then he is not accountable to any party for any interest gained while holding the money on trust.

[3] It is a common practice in conveyancing of landed properties in this country to have the memorandum of transfer executed both by the vendor and purchaser simultaneously with the sale & purchase agreement although the balance of the purchase has yet to be paid. This practice is one of convenience and saves a substantial amount of time.

Although clause 2 of the sale and purchase agreement in this case provides for the above practice, the appellant could not possibly forward the memorandum of transfer for adjudication until and unless all required particulars of the purchase are completed in the portion reserved for such purposes and the purchaser has executed the same.

[Appeal allowed. Decision of the disciplinary committee set aside with costs].

Cases referred to:

Toh Theam Hock v. Kemajuan Perwira Management Corp. Sdn. Bhd. [1988] 1 MLJ 116 ***(foll)***

Burt v. Claude Cousins & Co. Ltd. [1971] 2 QB 426 ***(refd)***

Sorrell v. Finch [1977] AC 728 ***(foll)***

Legislation referred to:
Legal Profession Act 1976, ss. 93(2)(b), 99

For the appellant - Mohd Yaacob Karim; M/s G.T. Rajan & Co.
For the respondents - N. Pathmanathan; M/s Skrine & Co.

JUDGMENT

James Foong J:
This is an appeal by way of a notice of motion by the appellant, Mr. G.T. Rajan (Rajan) against the decision made by the disciplinary committee dated 13 December 1991.

The facts of this case are as follows. The respondents were registered owners of a piece of land which they sold to two purchasers under a sale and purchase agreement dated 28 July 1989. Rajan was the solicitor for the respondents in this transaction. The purchasers were represented by their own solicitors M/s. Azam-Malek & Soh.

In clause 2 of the sale and purchase agreement it is stated that:

> Upon the execution of this agreement the parties hereto shall simultaneously execute a valid and registrable memorandum of transfer of the said property in favour of the purchasers or their nominee or nominees and the vendor shall deliver to the vendor's solicitors M/s G.T. Rajan & Co. all document of title to the said land for safe custody. The said solicitors are hereby duly authorised by the parties hereto to forthwith present the memorandum of transfer for adjudication and stamping thereof Provided Always that the said solicitors shall receive the balance purchase price of Ringgit Seven Hundred and Fifty Thousand (RM750,000) only from the purchaser before presentation of the memorandum of transfer and upon registration of the same the said balance of the purchase price of Ringgit Seven Hundred and Fifty Thousand (RM750,000) only shall be paid to the vendor forthwith.

The balance of the purchase price under the said agreement was to be paid within one year from the date of the said agreement.

When the balance of the purchase price was paid by the purchasers to Rajan, the respondents requested that this amount be deposited into a fixed deposit interest earning account. Rajan was of the view that as he was a stakeholder of the said money, he need not accede to the request of the respondents. Eventually when the balance of the purchase price was released to the respondents some 4 months after Rajan had received the same from the purchasers, it was without any interest. This prompted the respondents to complain to the State Bar Committee about the conduct of Rajan which ended up with an enquiry by the disciplinary committee appointed by the Chief Justice under s. 99 of the Legal Profession Act 1976 before its amendment in 1992.

From the decision of the disciplinary committee, Rajan was alleged to have been guilty of "conduct otherwise unbefitting an advocate and solicitor" under s. 93(2)(b) of the Legal Profession Act 1976 before its amendments in 1992.

During the hearing before the disciplinary committee, Counsel for Rajan and the respondents agreed on 3 issues. They were:

(1) During the whole transaction, was Rajan a solicitor for the respondents or a stakeholder?;

(2) Was Rajan late in sending the memorandum of transfer for adjudication and stamping?;

(3) Was the fee charged by Rajan on the respondents in respect of the transaction he handled for the respondents fair and reasonable?

It is presumed that if the answers are in the positive to any of the questions posted aforesaid, then Rajan is guilty of the alleged charge i.e. conduct unbefitting of an advocate and solicitor under s. 93 of the Legal Profession Act before its amendment in 1992.

To the first question, the disciplinary committee answered in the positive. The committee found that Rajan was the solicitor for the respondents in the transaction and as such, was an agent to the respondents and not a stakeholder. As an agent he was not entitled to the interest derived from the balance of the purchase price deposited with him for about 4 months.

In order to decide whether a person is an agent or a stakeholder, "the circumstances of the transaction as a whole" must be examined [see the judgment of Hashim Yeop A. Sani SCJ (as he then was) in *Toh Theam Hock v. Kemajuan Perwira Management Corp. Sdn. Bhd.* [1988] 1 MLJ 116 at p. 118].

It is without doubt that Rajan first appeared on the scene of this transaction as a solicitor acting

for the respondents. In that capacity he was an agent of the respondents. However, when the sale and purchase agreement was executed between the purchasers and the respondents, Rajan's role as an agent was somewhat transformed with an added duty and responsibility. The proviso in clause 2 of the sale and purchase agreement provides that Rajan shall receive the balance of the purchase price and not release the same until the registration of the transfer into the names of the purchasers, their nominee or nominees. This places a responsibility on Rajan to keep the said money in his own hands or to put it on deposit with a bank. In the event that registration of the transfer into the name of the purchasers or their nominee or nominees cannot be registered he has to return the said sum to them. On the other hand, without the money being placed with him, the respondents as vendors would have refused to allow the release of the document of title and the memorandum of transfer to the purchasers. In the opinion of this Court, Rajan was therefore placed in the position of a trustee where he was accountable to both the purchasers and the respondents. If he was an agent as submitted by the respondents' Counsel, then he is not accountable to the purchasers but, as one can see, this is not the case. The terms in clause 2 are clear and they were inserted to protect the interests of both the parties to the agreement. In order to do so, Rajan in the opinion of this Court was clearly a stakeholder in this situation. Though the word "stakeholder" is not expressly stated in the agreement, the circumstances are clear to imply that he was to play the role of such a character in this transaction.

From decided authorities, it is clear that if a person is a stakeholder then he is not accountable to any party for any interest gained while holding the money on trust. This point is clearly illustrated in the dissenting view of Lord Denning in *Burt v. Claude Cousins & Co. Ltd.* [1971] 2 QB 426 which was subsequently adopted by the House of Lords in *Sorrell v. Finch* [1977] AC 728 and accepted by the Supreme Court in *Toh Theam Hock's* Case. It reads as follows:

> If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder," he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see S*kinner v. Trustee of Property of Reed* [1967] 2 All ER 1286 at 1289, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it: see *Harington v. Hoggart* [1830] 1 B. & Ad. 577. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it; see *Eltham v. Kingsman* [1818] 1 B. & Ad. 683 and *Hampden v. Walsh* [1876] 1 QBD 189. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

As this Court has found that Rajan was a stakeholder of the balance of the purchase price received from the purchasers until subsequently released to the respondents, he is then entitled to keep for himself any interest earned on the said sum. Based on the aforesaid, this Court finds that the disciplinary committee has erred in fact and in law in arriving at their finding on the first question.

To the second question, the disciplinary committee also answered it in the positive. This issue arose from the fact that Rajan failed to "forthwith present the memorandum of transfer for adjudication and stamping" after the execution of the sale and purchase agreement. It is a common practice in conveyancing of landed properties in this country to have the memorandum of transfer executed both by the vendor and purchaser simultaneously with the sale and purchase agreement although the balance of the purchase price has yet to be paid. The executed memorandum of transfer is then forwarded to the relevant authorities for adjudication. This practice is adopted in view of a period of time taken by the government valuation department in assessing the value of the land in order to determine the amount of stamp duty that is required to be paid for the transfer. By the time when the balance of the purchase price is paid, which is normally an agreed period of 3 to 4 months from the date of agreement, the amount of stamp duty required to be paid on the transfer would have been made available. As soon as the stamp duty is paid, the memorandum of transfer together with the document of title to the land can then be presented for transfer. This therefore saves substantial amount of time as compared with the procedure of forwarding the memorandum of transfer for adjudication and stamping only when the balance of the purchase price is received. Prima-

rily, the sole purpose of this exercise is to enable the vendor to collect his balance of the purchase price which, as in this case, depends on the transfer of the said land being registered in the name of the purchasers.

Though clause 2 of the sale and purchase agreement in this case provides for such a procedure to be adopted, it was not being carried out. Instead, Rajan only forwarded the memorandum of transfer for adjudication and stamping after the balance of the purchase price was received by him from the purchasers. This eventually caused an approximate delay of 4 months before the respondents could receive the balance of the purchase price.

Rajan in his reply to this allegation explained that he could not have forwarded the memorandum of transfer for adjudication and stamping because the purchasers had failed to nominate their nominee until the time when the balance of the purchase price was paid.

In order to determine this issue, one must study the duties and obligations imposed upon Rajan under the sale and purchase agreement. Clause 2 of this agreement expressly authorised Rajan to "forthwith present the memorandum of transfer for adjudication and stamping." "Forthwith" should be read in conjunction with the earlier part of clause 2 which provides for the execution of the memorandum of transfer by the purchasers, their nominee or nominees. Unless this act i.e. the execution of the memorandum of transfer has taken place first, Rajan could not forthwith forward the same document for adjudication and stamping. It is not a disputed fact that the memorandum of transfer was only executed by the purchasers' nominees after the balance of the purchase price was received. Under such circumstances, how could Rajan possibly forward the memorandum of transfer for adjudication immediately after execution of the agreement. It must first be signed by the parties and then only forthwith sent for adjudication and stamping. Further, under normal conveyancing practice, a memorandum of transfer is not forwarded for adjudication and stamping until and unless all required particulars of the purchase are completed in the portion reserved for such purposes and the purchaser has executed on the same. Any memorandum of transfer without fulfilling this requirement is considered incomplete and has a likelihood of being rejected by the relevant authorities. Upon these reasons, this Court finds that Rajan cannot be blamed for sending the memorandum of transfer late for adjudication and stamping.

Based on the reasons stated above, this Court again finds that the disciplinary committee has erred in arriving at their conclusion to question number 2.

As for question number 3, the disciplinary committee had dismissed the respondents' complaint and as such, it need not be considered by this Court.

In view of the above, this Court allows the appeal of Rajan against the decision of the disciplinary committee and sets aside the orders so made thereunder with costs.